Abdul Malek Faisal bin Mohd Hyffny v Shaikh Markhzan Jalani & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(A)-1603–08 OF 2021
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
21 FEBRUARY 2023

Companies and Corporations — Irregularity in proceedings — Extraordinary general meeting ('EGM') — Articles of Association ('AA') of company and s 329 of Companies Act 2016 ('the CA') provided that chairman of company shall chair every general meeting of company unless he was not present at meeting within 15 minutes of time fixed for the meeting — Whether compliance with this provision was not only statutorily mandated but contractually agreed upon between shareholders inter se and between shareholders and company — Whether resolution passed by members opposed to company chairman to remove him as director of company was invalid as EGM was held in breach of CA and AA — Whether irregularity in holding of EGM was not curable under s 582 of CA as injustice company chairman suffered in being denied of right to be heard before he was removed as director was not remediable by any order of court

The instant appeal concerned the validity of an extraordinary general meeting ('EGM') of a company which commenced and ended within six minutes. During those six minutes, a resolution was passed to remove the appellant as a director (and chairman) of the third respondent ('the company') with immediate effect. The EGM to remove the appellant was requisitioned by the first respondent ('R1'), who, together with the second respondent ('R2') formed one of the two rival factions in the company. The other faction comprised the appellant and one Mohd Radzee Abdullah ('Radzee'). The appellant and Radzee together held 225,000 shares in the company whilst R1 and R2 together originally held 275,000 shares before the ownership of 50,000 of those shares under R2's name became the subject of litigation between the appellant, R1 and R2. Pending the resolution of that litigation, the appellant and R1 agreed that the disputed 50,000 shares would not count when it came to the exercise of voting rights at any general meeting of the company. That meant that at the time the EGM was held, both factions had equal strength of 225,000 votes each for voting purposes. Article 53 of the company's articles of association ('AA') provided that in the event of a tie, the chairman of the meeting would have the casting vote. Both art 49 of the AA as well as s 329 of the Companies Act 2016 ('the CA') provided, inter alia, that the chairman of the board of directors (who, in this case, was the appellant) shall preside as the chairperson at every general meeting of the company and that if the chairman

was not present within 15 minutes after the time appointed for the holding of the meeting, the members present shall elect one of their members to be the chairperson of the meeting. On the morning of the EGM, which was scheduled to convene at 10.30am at the company secretary's office, the appellant emailed the company secretary and R1 to say that he would be 'slightly late' for the meeting, 'latest before 11am'. The EGM, attended by R1 and R2's proxy, Awaludin, commenced at 10.35am after R1 had appointed himself as chairman of the meeting. R1 then called for a vote on the resolution to remove the appellant as director of the company. Both R1 and Awaludin voted in favour of the resolution after which the meeting was declared closed at 10.41am. The appellant claimed that he and Radzee arrived at the EGM at 10.45am but found that the meeting had already ended. The appellant argued that since he arrived at the EGM within the 15-minute waiting period, he had the right under the AA as chairman of the Board to chair the EGM, make his views known about the resolution and to vote on it. The appellant applied to the High Court to declare the resolution passed at the EGM as null and void but the application was dismissed on the ground that the appellant had failed to positively prove that he was at the EGM by 10.45am. In any event, the court held that the failure of the other members present at the EGM to observe the 15-minute waiting period before commencing the EGM was a procedural irregularity that was curable. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal, setting aside the High Court's decision and declaring that the resolution passed at the EGM was null and void and that the appellant was still a director of the company:

(1) The AA was a contract between the shareholders of the company inter-se as well as between the shareholders and the company. The AA set out the rules and procedures with respect to the proper governance of a company and in the context of the instant dispute, the manner of convening a general meeting. Like all contracts, they were binding on the contracting parties. Shareholders who rights had been infringed by non-compliance with those rules and procedures were entitled to bring an action to claim the necessary reliefs against the defaulting party (see para 31).

(2) As members of the company, D1 and D2, through his proxy, were bound to comply with the requirement of waiting for 15 minutes after the time set for the holding of the meeting as required under art 49 of the AA and s 329 of the CA. Their failure to comply with the same resulted in the appellant being deprived of his right to chair the meeting as chairman of the board. He was also deprived of the right to be heard before a vote was taken on the resolution to remove him as director and chairman of the board. Since there was no specific denial of the appellant's averment that he had arrived for the EGM at 10.45am, the High Court judge should have accepted the appellant's assertion that he was there at that time. If

R1 wanted to refute that averment, he should have adduced evidence to the contrary (see paras 37, 39 & 62).

(3) The very fact that the record showed that the EGM commenced at 10.35am and ended at 10.41am was sufficient to show that the waiting period of 15 minutes was not complied with in breach of art 49 of the AA and s 329 of the CA, thus rendering both the EGM and the resolution passed thereat invalid and null and void. The High Court judge was wrong to hold that because the appellant in his email did not say that he would be present at the EGM within 15 minutes from the time set for the meeting, it was justified for the respondents not to wait until the 15 minutes was over. The respondents were only obliged not to wait past 10.45am. Neither the fact that there was a quorum or that the company secretary had given the go-ahead for the meeting to convene validated the EGM. (see paras 40, 44–45, 50, 52 & 60).

(4) The curative provision in s 582 of the CA could only be invoked to cure an irregularity if the court was satisfied that no substantial injustice had been or might be caused which could not be remedied by any order of the court. The discretionary power under s 582 had to be exercised judiciously and the justice of the case had to be considered seriously. For the court to exercise discretion under s 582 of the CA to cure the irregularity in the present case would be to pay lip-service to the right to be heard, which right the appellant was deprived of in a resolution passed that grievously affected his position both as director and chairman of the company (see paras 72–73 & 80).

[Bahasa Malaysia summary

Rayuan semasa adalah berkenaan dengan kesahihan mesyuarat agung luar biasa ('MALB') sebuah syarikat yang bermula dan berakhir dalam masa enam minit. Dalam tempoh enam minit tersebut, satu resolusi telah diluluskan untuk memecat perayu sebagai pengarah (dan pengerusi) responden ketiga ('syarikat tersebut') berkuat kuasa serta-merta. MALB untuk memecat perayu telah dimohon oleh responden pertama ('R1'), yang bersama-sama dengan responden kedua ('R2') membentuk salah satu daripada dua kumpulan yang bersaing dalam syarikat tersebut. Satu lagi kumpulan terdiri daripada perayu dan seorang Mohd Radzee Abdullah ('Radzee'). Perayu dan Radzee bersama-sama memegang 225,000 saham dalam syarikat tersebut manakala R1 dan R2 bersama-sama pada asalnya memegang 275,000 saham sebelum pemilikan 50,000 saham di bawah nama R2 yang menjadi subjek litigasi antara perayu, R1 dan R2. Sementara menunggu penyelesaian litigasi tersebut, perayu dan R1 bersetuju bahawa 50,000 saham yang dipertikaikan tidak akan dikira apabila ia melibatkan pelaksanaan hak mengundi di mana-mana mesyuarat agung syarikat. Ini bermakna ketika MALB diadakan, kedua-dua kumpulan mempunyai kekuatan yang sama iaitu 225,000 undi setiap satu untuk tujuan pengundian. Perkara 53 Tataurusan Syarikat ('TS') memperuntukkan bahawa

sekiranya berlaku seri, pengerusi mesyuarat akan mempunyai undi pemutus. Kedua-dua perkara 49 TS dan juga s 329 Akta Syarikat 2016 ('AS') memperuntukkan, antara lain, bahawa pengerusi lembaga pengarah (yang, dalam kes ini, adalah perayu) hendaklah menjadi pengerusi pada setiap mesyuarat agung syarikat dan jika pengerusi tidak hadir dalam tempoh 15 minit selepas masa yang ditetapkan untuk mengadakan mesyuarat, ahli yang hadir hendaklah memilih salah seorang ahli mereka untuk menjadi pengerusi mesyuarat. Pada pagi MALB, yang dijadual bersidang pada pukul 10.30 pagi di pejabat setiausaha syarikat, perayu menghantar e-mel kepada setiausaha syarikat dan R1 untuk mengatakan bahawa beliau akan 'lewat sedikit' untuk ke mesyuarat tersebut, 'selewat-lewatnya sebelum 11 pagi'. MALB yang dihadiri proksi R1 dan R2, Awaludin, bermula pada 10.35 pagi selepas R1 melantik dirinya sebagai pengerusi mesyuarat tersebut. R1 kemudian memanggil undian mengenai resolusi untuk memecat perayu sebagai pengarah syarikat. Kedua-dua R1 dan Awaludin mengundi menyokong resolusi tersebut selepas mesyuarat diisytiharkan tamat pada 10.41 pagi. Perayu mendakwa beliau dan Radzee tiba di MALB pada 10.45 pagi tetapi mendapati mesyuarat telah pun tamat. Perayu berhujah bahawa memandangkan beliau tiba di MALB dalam tempoh menunggu 15 minit, beliau mempunyai hak di bawah TS sebagai pengerusi Lembaga untuk mempengerusikan MALB, menyatakan pandangannya mengenai resolusi dan mengundi mengenainya. Perayu memohon kepada Mahkamah Tinggi untuk mengisytiharkan resolusi yang diluluskan di MALB sebagai terbatal dan tidak sah tetapi permohonan tersebut ditolak atas alasan bahawa perayu telah gagal membuktikan secara positif bahawa beliau berada di MALB pada 10.45 pagi. Walau apa pun, mahkamah memutuskan bahawa kegagalan ahli lain yang hadir di MALB untuk mematuhi tempoh menunggu 15 minit sebelum memulakan MALB adalah ketidakaturan prosedur yang boleh dibetulkan. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan mengisytiharkan bahawa resolusi yang diluluskan pada MALB adalah terbatal dan tidak sah dan perayu masih merupakan pengarah syarikat:

(1) TS adalah kontrak antara pemegang saham antara syarikat dan juga antara pemegang saham dan syarikat. TS menetapkan peraturan dan prosedur berkenaan dengan tadbir urus syarikat yang betul dan dalam konteks pertikaian semasa, cara mengadakan mesyuarat agung. Seperti semua kontrak, ia mengikat pihak yang berkontrak. Pemegang saham yang haknya telah dilanggar oleh ketidakpatuhan peraturan dan prosedur tersebut berhak untuk membawa tindakan untuk menuntut relif yang diperlukan terhadap pihak yang mungkir (lihat perenggan 31).

(2) Sebagai ahli syarikat, D1 dan D2, melalui proksinya, terikat untuk mematuhi keperluan menunggu selama 15 minit selepas masa yang

ditetapkan untuk mengadakan mesyuarat seperti yang dikehendaki di bawah perkara 49 TS dan s 329 daripada AS. Kegagalan mereka untuk mematuhi perkara yang sama menyebabkan perayu dilucutkan haknya untuk mempengerusikan mesyuarat sebagai pengerusi lembaga. Beliau juga telah dilucutkan hak untuk didengari sebelum undian diambil mengenai resolusi untuk memecatnya sebagai pengarah dan pengerusi lembaga. Memandangkan tidak ada penafian khusus terhadap kenyataan perayu bahawa beliau telah tiba untuk MALB pada 10.45 pagi, hakim Mahkamah Tinggi sepatutnya menerima pengataan perayu bahawa beliau berada di sana pada masa itu. Jika R1 ingin menyangkal pengataan tersebut, beliau sepatutnya mengemukakan keterangan sebaliknya (lihat perenggan 37, 39 & 62).

(3) Hakikat bahawa rekod menunjukkan bahawa MALB bermula pada 10.35 pagi dan berakhir pada 10.41 pagi adalah mencukupi untuk menunjukkan bahawa tempoh menunggu selama 15 minit tidak dipatuhi dalam melanggar perkara 49 TS dan s 329 TS. AS, sekali gus menjadikan kedua-dua MALB dan resolusi yang diluluskan tidak sahih dan batal dan tidak sah. Hakim Mahkamah Tinggi tersilap dalam memutuskan bahawa kerana perayu dalam e-melnya tidak mengatakan bahawa beliau akan hadir di MALB dalam tempoh 15 minit dari masa yang ditetapkan untuk mesyuarat tersebut, ia adalah wajar bagi responden untuk tidak menunggu sehingga 15 minit sudah tamat. Responden hanya diwajibkan untuk tidak menunggu lebih dari 10.45 pagi. Fakta bahawa terdapat kuorum atau bahawa setiausaha syarikat telah memberi kebenaran untuk mesyuarat diadakan tidak mengesahkan MALB tersebut. (lihat perenggan 40, 44–45, 50, 52 & 60).

(4) Peruntukan kuratif dalam s 582 AS hanya boleh digunakan untuk membetulkan ketidakteraturan jika mahkamah berpuas hati bahawa tiada ketidakadilan yang besar telah atau mungkin disebabkan yang tidak boleh diperbaiki oleh mana-mana perintah mahkamah. Kuasa budi bicara di bawah s 582 perlu dilaksanakan secara bijaksana dan keadilan kes perlu dipertimbangkan dengan serius. Bagi mahkamah untuk menggunakan budi bicara di bawah s 582 AS untuk membetulkan ketidakaturan dalam kes semasa adalah dengan memberi kata-kata kepada hak untuk didengar, yang mana hak perayu telah dilucutkan dalam resolusi yang diluluskan yang menjejaskan kedudukannya dengan teruk sebagai pengarah dan pengerusi syarikat (lihat perenggan 72–73 & 80).]

Cases referred to

HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor and another appeal [2005] 1 CLJ 23, CA (refd)

Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd [2008] 3 MLJ 653, CA (refd)

LGB Engineering Sdn Bhd & Ors v Rayston Resources Sdn Bhd [2023] 1 MLJ 649, CA (refd)
Queensland Press Ltd v Academy Investments No 3 Pty Ltd (1987) 11 ACLR 419, SC (refd)
Smith v Permanent Trustee Australia Ltd (1992) 10 ACLC 906, SC (refd)
Windsor v National Mutual Life Association of Australasia Ltd (1992) 7 ACSR 210, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 30(2), 128(2), 181, 355, Fourth Schedule
Companies Act 2016 ss 208, 309, 310, 311, 313, 313(1), 328, 329, 329(1), (2), 582, 619(3)

Appeal from: Originating Summons No BA-24NCC-69–07 of 2020 (High Court, Shah Alam)

Mohd Munzeer bin Zainul Abidin (with Adam Luqman Amdan) (Yusfarizal, Aziz & Zaid) for the appellant.
Jaspal Singh (Jaspal Singh & Assoc) for the first and second respondents.

Lee Swee Seng JCA (delivering judgment of the court):

[1] We have often been told to be on time and even in time. What then is the status of an Extraordinary General Meeting ('EGM') of a company fixed at 10.30am with a waiting period of 15 minutes for the chairman of the board to be present to chair the EGM as provided for in the articles of association of the company but then the EGM had commenced at 10.35am and ended at 10.41am? The resolution passed was for the removal of a director who is also the chairman of the board.

[2] The issue assumes critical importance when each side seems to have equality of votes with the chairman, if he is present to have the casting vote. Is the EGM a valid one and is the resolution passed valid? Is the irregularity curable?

[3] This appeal then is the continuing saga in the disputes between two camps in a company. One side is the plaintiff in the High Court who is the appellant before us and one Mr Mohd Radzee bin Abdullah ('Radzee') and they each hold 175,000 shares and 50,000 shares respectively in the third defendant company called Minsyam Sdn Bhd ('the company').

[4] The first defendant (D1) is Shaik Markhzan Jalani who is the first respondent (R1) before us and, holding 175,000 shares in the company. The

second respondent (R2) who was the second defendant (D2) in the High Court below is Syed Zainal Abidin bin Syed Mohamed Tahir, holding initially 100,000 shares in the company. The shareholdings of the parties may be stated as follows:

NAME	SHARES
Abdul Malek Faisal bin Mohd Hyffny (appellant/plaintiff)	175,000 unit
Shaik Markhzan Jalani (R1/D1)	175,000 unit
Syed Zainal Abidin bin Syed Mohamed Tahir (R2/D2)	100,000 unit
Mohd Radzee bin Abdullah	50,000 unit

[5] The plaintiff narrated that prior to 2018 the management of the company was under the control of D1 and D2 with D1 as the Managing Director and D2 as the chairman. There were allegations of misuse of the company's funds levelled by the plaintiff against D1 and D2 and after some pressure was brought to bear upon them, D1 and D2 agreed to have an independent auditor in Gomez & Co to conduct a forensic audit of the company' accounts.

[6] Arising from the audited reports of Gomez & Co, the plaintiff and Radzee discovered some financial irregularities and then initiated an oppression action against D1 and D2 in Shah Alam High Court Suit No 24NCC-83–12 of 2015 under s 181 of the Companies Act 1965 which led to a finding by the High Court on 30 May 2017 that D1 and D2 had perpetrated acts of oppression on the plaintiff and Radzee. The High Court had further ordered that an independent valuer be appointed to value the company and for the parties to offer to buy out the other. The opposing parties managed to reach a settlement for the plaintiff to purchase 50,000 shares held by D2 in the company for RM300,000.

[7] D2 thereafter resigned as a director of the company and sold 50,000 of his 100,000 shares to the plaintiff via a share sale agreement dated 20 February 2019 ('SSA'). Following the oppression action, the plaintiff and Radzee have been given access into the management of the company.

[8] After the resignation of D2, a board meeting was held on 27 November 2018 wherein the plaintiff was appointed as the new chairman of the company and D1's position as Managing Director was revoked though he still remained as one of the directors of the company. Radzee was appointed as the new Managing Director.

[9] D1 was dissatisfied with the outcome of the board meeting and the sale

of the 50,000 shares by D2 to the plaintiff and so D1 sued D2 in the Shah Alam Sessions Court in Suit No BA-B52-20–04 of 2018 claiming that all the 100,000 of D2's shares belong to him. D1 and D2 agreed between themselves to settle the suit amicably and D2 agreed to transfer all his 100,000 shares to D1 and with that D1 withdrew his suit against D2.

[10] D2 also granted a power of attorney ('PA') to D1 giving him all rights over D2's 100,000 shares which to the plaintiff is in total disregard of the SSA. Thus, the plaintiff commenced a suit against D2 on 26 April 2019 in Suit BA-A52NCC-188–04 of 2019 in the Shah Alam Sessions Court (Suit 188') against D2 for a declaration that the SSA is valid and for specific performance of the SSA. See the writ and statement of claim in encl 5 pp 29–41 appeal record.

[11] The plaintiff in Suit 188 also prayed for an order declaring that he is the rightful owner or beneficiary to the 50,000 shares sold by D2 to him through the SSA and for specific performance of the SSA and for the consequential order that D2 do execute a valid and registrable instrument for the transfer of the shares in favour of the plaintiff.

[12] D1 had intervened in Suit 188 and counterclaimed against the plaintiff and prayed for a declaration that the transfer of 100,000 shares from D2 to D1 is valid and enforceable. See the defence and counterclaim of D1 as intervener in Suit 188 in encl 5 at pp 42–47 appeal record.

[13] At the time of hearing this appeal Suit 188 had been partially heard but the sessions court had not handed down its decision yet. As the matter of the ownership of the 50,000 shares of D2 is before the Shah Alam Sessions Court in Suit 188, we agree with learned counsel for the defendants that there is no need for this court to venture into what is for the sessions court to decide.

[14] Suffice to say that D2's contention in Suit 188 was that the SSA had been lawfully terminated for non-payment of the purchase price. The plaintiff on the other hand contended that the full purchase price had been paid and that later D2 had agreed to lend the sum of RM300,000 to the company to help settle the arrears of payments to Inland Revenue Board, Royal Customs and Excise, SME Bank and EPF which sums were owing by the company during the stewardship of the company by D2.

[15] The plaintiff also applied in another action in Originating Summons BA-24NCC-72–05 of 2019 in the Shah Alam High Court ('OS 72') to restrain D1 from calling a general meeting until the disposal of Suit 188. The plaintiff and D1 then entered into a consent order dated 23 August 2019 without any admission of liability wherein D1 agreed not to utilise or execute on the PA

A until the disposal of Suit 188. See the consent order in encl 5 pp 74–76 appeal record.

[16] According to the plaintiff, D1 and D2 then conspired to circumvent the consent judgment by D2 appointing D1 as his proxy vide a proxy form dated 19 November 2019 (first proxy form) allowing D1 to vote on the 100,000 shares of D2 despite D1 having agreed with the plaintiff not to utilise the PA in the consent judgment.

[17] The plaintiff and Radzee objected to the validity of the first proxy form and this sparked some creativity in D2 to issue another proxy form (second proxy form) on 19 February 2020 appointing one Awaludin as his proxy for his 100,000 shares to vote for the resolution at the EGM to be called by D1. See encl 5 p 48 appeal record.

[18] D1 had requisitioned under s 311 of the Companies Act 2016 on 22 January 2020 for an EGM for the removal of the plaintiff as a director of the company. See 'The Notice of Requisition for a Meeting of Members' in encl 5 at p 49 appeal record.

[19] The shareholding of the factions becomes critically important because the plaintiff with his 175,000 shares and that of Radzee 50,000 shares would have a combined total of 225,000 shares.

[20] As for D1, he has 175,000 shares and D2 has his 50,000 shares; the other 50,000 being agreed between D1 and the plaintiff as not to be utilised for the voting purpose until the disposal of Suit 188. That would give D1 and D2 a combined 225,000 shares for voting purpose. In the event of a tie, the chairman of the meeting would have the casting vote. That brings to the fore the defining importance of the requisitioned EGM.

[21] At the requisitioned EGM scheduled to convene at 10.30am on 9 March 2020, it was recorded in the minutes kept that the meeting had started at 10.35am and ended at 10.41am where D1 appointed himself as chairman and then he, together with Awaludin who was acting as a proxy for D2, had voted for the removal of the plaintiff as a director and chairman of the company.

[22] The plaintiff had on the morning of 9 March 2020 emailed the company secretary and D1 that he would be attending the requisitioned EGM before 11am. The plaintiff stated that he and Radzee had arrived at the place of meeting at the company secretary's office at 10.45am only to find that the EGM had already ended.

[23] The plaintiff argued that as the chairman of the company he had the right to chair the EGM if he was there by or before 10.45am as stated in the company's articles of association. He contended that he had been denied his statutory right to attend and chair the meeting as well as to participate in the discussion about his removal as director and chairman of the company and to vote on the resolution.

AT THE HIGH COURT

[24] He therefore applied to the High Court via an originating summons to seeking, inter alia, a declaration that the resolution passed during the requisitioned EGM to remove him as a director and chairman of the company was invalid and null and void.

[25] The High Court dismissed his application chiefly on ground that he had not proved that he was there by 10.45am and that in any event the non-compliance with the waiting period of 15 minutes from the time of the scheduled commencement of the meeting was a procedural irregularity that is curable as the outcome of the voting would have been the same since D1 has 175,000 shares in the company and D2 still has 100,000 shares in his name until Suit 188 is disposed of.

[26] Dissatisfied with the decision of the High Court, the plaintiff had appealed to the Court of Appeal and the parties shall be referred to as they were in the High Court.

BEFORE THE COURT OF APPEAL

[27] It was argued before us that:

(a) the learned High Court judge erred in law and in fact in failing to conclude that the EGM was wrongly convened and as such the resolution passed was invalid, null and void;

(b) that the EGM convened before the expiry of the prescribed 15 minutes waiting time is in violation of the plaintiff's statutory right under article 49 of the company's articles of association and s 329 of the Companies Act 2016;

(c) that the learned High Court judge had erred in law and in fact when he failed to consider the relevant fact that there said EGM was convened at 10.35am without any explanation from the defendants as to why the prescribed 15 minutes waiting time was not complied with; and

(d) that the learned High Court judge had erred and misdirected himself when he unnecessarily demanded for evidence that the plaintiff had arrived within 15 minutes of the time scheduled for the meeting.

Whether the requisitioned EGM was wrongly convened in violation of the articles of association and statutory requirement

[28] The relevant statutory provision is s 309 of the Companies Act 2016 which is parked under Subdivision 3 under 'Passing Resolutions at Meetings of Members' which reads:

309 Resolutions at meetings of members

Unless otherwise provided in the constitution, a resolution shall be validly passed at a meeting of members if —

(a) notice of the meeting and of the resolution is given; and

(b) the meeting is held and conducted, in accordance with the provisions of this Subdivision.

[29] The other relevant provision is s 329 of the Companies Act 2016 that provides for the Chairperson of meetings of members and it reads as follows:

329 Chairperson of meetings of members

(1) Subject to any provision of the constitution that states who shall be the chairperson, *the chairman of the Board, if any, shall preside as the chairperson at every general meeting of the company*.

(2) If there is no such chairman, or *if the chairman is not present within fifteen minutes after the time appointed for the holding of the meeting* or is unwilling to act, the members present shall elect one of their members to be chairperson of the meeting. (Emphasis added.)

[30] The provision in the articles of association of the company in article 49 under the Companies Act 1965 is also consistent with the Companies Act 2016. Article 49 reads as follows:

Proceedings at General Meetings

...

49. The chairman, if any, of the board of directors *shall preside as chairman at every general meeting of the company*, or if there is no such chairman, or if he is not present within fifteen minutes after the time appointed for the holding of the meeting or is unwilling to act, the members present shall elect one of their number to be chairman of the meeting. (Emphasis added.)

[31] The articles of association is a contract between the shareholders of the company inter-se and also between the shareholders and the company. The articles of association set out the rules and procedures with respect to the proper

governance of a company and in the context of this dispute, the manner of convening a general meeting. Like all contracts, they are binding on the contracting parties and shareholders whose rights have been infringed by the non-compliance by a shareholder or the company may bring an action to claim the necessary reliefs against the defaulting shareholder(s) and the company.

[32] Under the old Companies Act 1965 it is provided that where the companies which are limited by shares have not registered their articles of association, then, under s 30(2), by default, the regulations in Table A of the Fourth Schedule are adopted. Likewise, if the articles of association do not exclude or modify the regulations contained in Table A of the Fourth Schedule, those regulations shall so far as applicable be the articles of association of the company in the same manner and to the same extent as if they were contained in registered articles.

[33] Under the new Companies Act 2016, the Memorandum and articles of association of a company are now specifically referred to as the Constitution of the company. Section 619(3) of the Companies Act 2016 which came into effect on 31 January 2017 addressed the incorporation of the old Memorandum and articles of association of a company under the Companies Act 1965 into the new Companies Act 2016 as follows:

> (3) The memorandum of association and articles of association of an existing company in force and operative at the commencement of this Act, and the provisions of Table A under the Fourth Schedule of the Companies Act 1965 if adopted as all or part of the articles of association of a company at the commencement of this Act, shall have effect as if made or adopted under this Act, unless otherwise resolved by the company.

[34] Having established that both article 49 and s 329 of the Companies Act 2016 are applicable in determining the validity of the requisitioned members' meeting, the question then is whether the procedure set forth therein had been complied with.

[35] From the minutes kept by the company secretary, of which the truth of its contents is not disputed, the following factual events are not challenged:

(a) the members' meeting was scheduled to convene at 10.30am on 9 March 2020;

(b) the meeting started at 10:35am and those present were D1 and Awaludin who was the proxy of D2;

(c) D1 appointed himself as chairman of the meeting;

(d) D1 and Awaludin voted for the removal of the plaintiff as director and chairman of the company;

(e) the resolution was passed; and

(f) the meeting concluded at 10.41am.

[36] The relevant part of the 'Minutes of the EGM held at 62C, Jalan SS 21/62, Damansara Utama, 47000 Petaling Jaya, Selangor Darul Ehsan, on Monday, 9th Day of March 2020 at 10.20am' in encl 5 at pp 52–53 appeal record reads as follows:

> Prior to the Meeting, the Secretary informed those present that there was an Interim Injunction Order ('Injunction') received on the 50,000 ordinary shares of Dato' Sri Syed Zainal Abidin B Syed Mohamed Tahir. A copy of the Injunction is attached to this minutes.
>
> *1. CHAIRMAN*
>
> Shaik Markhzan Jalani was elected to Chair the Meeting. He welcomed and thanked the Members/Proxy present.
>
> The Secretary confirmed that there was sufficient quorum in accordance with Regulation 48 of the Company's Constitution.
>
> *With the prerequisite quorum, Mr Chairman commenced the Meeting at 10.35 am*
>
> No. 1 AGENDA 1
>
> REMOVAL OF DIRECTOR
>
> The Chairman briefed those present in the Meeting that the only agenda of this Meeting is, if thought fit, to pass the following resolution:
>
> Ordinary Resolution 1 — Removal of Director
>
> 'THAT Abdul Malek Faisal Bin Mohd Hyffny (NRIC No. 660611-01-58470 be hereby removed as a Director of the Company with immediate effect.'
>
> Mr Chairman then put the resolution to vote.
>
> The Meeting proceeded to take the votes on the resolution by show of hand.
>
> It was unanimously RESOLVED:
>
> 'THAT Abdul Malek Faisal Bin Mohd Hyffny (NRIC No. 660611-01-58470 be hereby removed as a Director of the Company with immediate effect.'
>
> AND THAT the Company Secretary be and is hereby authorised to lodge in the necessary form to Companies Commission of Malaysia accordingly.'
>
> No. 2 CLOSURE OF MEETING
>
> *Mr Chairman thanked all present and declared the Meeting closed at 10.41 am* with a vote of thanks accorded to him.
>
> CONFIRMED AS A CORRECT PROCEEDINGS HELD THEREAT
>
> SGD
>
> (Illegible)
>
> .....
>
> SHAIKH MARKHZAN JALANI

Chairman

Date: 11 March 2020. (Emphasis added.)

[37] As members of the company, D1, and D2 through his proxy, are bound to comply with the requirement of waiting for 15 minutes after the time set for the holding of the meeting as required both under article 49 and s 329 of the Companies Act 2016, this had clearly not been complied with. The consequence is that the plaintiff had been deprived of his right to be present at the requisitioned members' meeting wherein he was allowed until 10.45am to be present and to have the right to chair the meeting as he was at the material time the chairman of the board.

[38] The defendants are not denying that the plaintiff was there at the meeting at 10.45am. All that D1 said at para IV of his affidavit affirmed on 19 October 2020 is that he did not know what time the plaintiff had arrived for the EGM because he and D2's proxy had left the meeting at 10.45am. D1 further said that the plaintiff had not given any evidence to show that he had arrived for the EGM at 10.45am and that he believed it is an afterthought on the plaintiff's part. D1 further stated that he did not bump into the plaintiff when he left the place of meeting at 10.45am with D2's proxy.

[39] As there was no specific denial of the plaintiff's averment that he had arrived for the EGM at 10.45am the learned High Court judge should have accepted the plaintiff's assertion that he was there at that time. If D1 wanted to refute this then he must adduce evidence to the contrary.

[40] In any event the members' meeting is defective for by the very admission from the record of the minutes, the meeting had concluded by 10.41am and so subsequent events are no longer relevant with respect to the facts material to decide on the validity of the members' meeting. The company secretary's minutes itself showed the non-compliance with the procedural requirement of waiting for 15 minutes before D1 could appoint himself as the chairman and a vote be taken on the resolution to remove the plaintiff as director and with that his removal as chairman of the board too.

[41] It was clear that the meeting was rushed through as D1 was aware that the plaintiff may be late as notified in his email to D1 that morning itself. Irrespective of D1's motive he must of necessity wait for 15 minutes to be over from the time set for the holding of the meeting at 10.30am. Instead D1 and D2's proxy only waited until 10.35am and then convened the meeting at 10.35am and concluded it at 10.41am. Why the rush? The inference is that should the plaintiff arrive by 10.45am the resolution may not be carried and indeed may be defeated with the plaintiff having the casting vote as the chairman of the meeting.

[42] We agree with learned counsel for the plaintiff that unless there is proof that the plaintiff refused to attend the members' meeting, then the defendants present must wait until the 15 minutes have passed from the time of the scheduled meeting.

[43] The email of the plaintiff to both D1 and the company secretary gives no justification for D1 to appoint himself as the chairman of the meeting when convening the meeting at 10.35am and to quickly conclude it at 10.41am in what is clearly an attempt to pre-empt the plaintiff and Radzee from arriving by 10.45am. All the email of the plaintiff said was that:

> Insyallah *I will be coming in*, but I will be *slightly late. Latest before 11am.* (Emphasis added.)

[44] The learned judge had misread the email sent as saying that the plaintiff did not say that he would be present within 15 minutes from the scheduled time of 10.30am and so under the circumstance the defendants were justified in not having to wait until the plaintiff arrives. See paras [24] and [25] of the High Court's judgment which is reproduced below in its original language:

> [24] Bagi isu kedua saya dapati mesyuarat agung luarbiasa defendan ketiga telah diadakan secara sah. *Mesyuarat tersebut telah dipanggil secara wajar dan disidangkan mengikut tarikh dan waktu yang ditetapkan ...*
>
> [25] Seterusnya, saya dapati defendan pertama dan defendan kedua melalui proksinya tidak melanggar peruntukan undang-undang apabila meneruskan mesyuarat agung luarbiasa tersebut tanpa menunggu kehadiran plaintif. Tindakan plaintif menghantar email pada pagi itu untuk menyatakan dia akan hadir lambat tidak menjadikan mesyuarat yang dijalankan tersebut tidak sah. *Saya berpuas hati email tersebut tidak dengan jelas mengatakan plaintif akan hadir tidak lewat dari tempoh 15 minit dari waktu yang ditetapkan*. Di dalam keadaan kes ini saya berpuas hati mesyuarat boleh diteruskan tanpa perlu menunggu kehadiran plaintif kerana *plaintif sendiri telah memberi kepastian melalui email bahawa dia akan datang lewat*. Saya berpuas hati kehendak undang-undang untuk meneruskan mesyuarat termasuk keperluan korum dan perlantikan seseorang sebagai pengerusi mesyuarat telah dipenuhi. (Emphasis added.)

[45] Whilst we accept the fact that the defendants were not obliged to wait past 10.45am, we however cannot condone the convening of the members' meeting at 10.35am and concluding it at 10.41am to be a members' meeting that had complied with article 49 and s 329 of the Companies Act 2016.

[46] The email cannot be interpreted to be a clear and unequivocal message that the plaintiff and Radzee would definitely not be at the EGM by 10.45am or that they would only be there past 10.45am and not exceeding 11am latest. From the way the email is worded, the plaintiff indicated that he would be there

anytime from 10.31am to 11am. Granted, after 10.45am the defendants are not obliged to wait for the plaintiffs any longer.

[47] As for whether the plaintiff was the chairman of the board, that fact could not be disputed as it was so recorded in the attendance list as '(Chairman & Shareholder)' below the name of the plaintiff. See encl 5 at p 82 appeal record.

[48] We were further satisfied that the plaintiff was appointed the new chairman of the company when D2 had resigned as a result of the oppression order issued by the High Court.

[49] The learned judge further erred when he concluded that as there was quorum with the presence of the defendants at the meeting ie D1 and D2 via his proxy, the company secretary was permitted to proceed with convening the meeting at 10.31am.

[50] With respect we cannot agree as quorum is only one of the requirements for convening a meeting and the other requirement is the contractual agreement under article 49 and the statutory requirement under s 329 of the Companies Act 2016. The mandatory language 'shall' in both article 49 and s 329 with respect to the chairman chairing the meeting unless he could not be present after the lapse of 15 minutes from the scheduled time of the meeting cannot be ignored simply because the defendants had not the patience to wait.

[51] Moreover the provision of s 328 on 'Quorum at meetings' is parked under Subdivision 5 titled 'Procedure at Meetings' and immediately after s 328 is s 329(1) on the mandatory requirement of the chairman of the board to preside at every general meeting of the company and then s 329(2) with respect to the waiting time of 15 minutes for the chairman to be present, failing which the members present shall elect one of their members to be chairperson of the meeting. Clearly both requirements of ss 328 and 329 of the Companies Act 2016 must be met with respect to convening a meeting for there to be a valid meeting. Section 329 is not there for decorative purpose but for a designed purpose to ensure proper chairmanship of meeting.

[52] The fact that the company secretary gave the go-ahead for the meeting to convene does not make the meeting valid where the contractual and statutory requirements have not been complied with.

[53] It was also argued for the defendants that the plaintiff had no right to complain because the plaintiff had acted in bad faith in not convening the requisitioned EGM. It is true that ordinarily the Board upon receipt of the Notice to Requisition an EGM should act on it and call for an EGM to be held

to discuss the proposed resolution as stated in s 311 of the Companies Act 2016.

[54] Section 310 on 'Power to convene meetings of members' provides as follows:

A meeting of members may be convened by —

(a) the Board; or

(b) any member holding at least ten per centum of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by at least five per centum in the number of the members.

[55] Section 311 further provides as follows:

(1) The members of a company may require the directors to convene a meeting of members of the company.

(2) A requisition under subsection (1) —

(a) shall be in hard copy or electronic form;

(b) shall state the general nature of the business to be dealt with at the meeting;

(c) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting; and

(d) shall be signed or authenticated by the person making the requisition.

(3) The directors shall call for a meeting of members once the company has received requisition to do so from —

(a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or

(b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members.

(4) Notwithstanding subsection (3), in the case of a private company, members representing at least five per centum of the paid up capital of the company carrying the right of voting at meeting of members of the company may require a meeting of members to be convened if more than twelve months has elapsed since the end of the last meeting of members convened pursuant to a requisition under this section and *the proposed resolution is not defamatory, vexatious or frivolous*.

(5) *A resolution may properly be moved at a meeting unless the resolution —*

(a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution; A

(b) is defamatory of any person;

(c) *is frivolous or vexatious; or*

(d) *if passed, would not be in the best interest of the company.* B

(6) For the purposes of subsections (3) and (4), the right of voting shall be determined at the date the requisition is deposited with the company.

[56] The Board would still have a discretion whether or not to convene the requisitioned EGM having regard to whether the proposed resolution would be vexatious or frivolous or that if passed would not be in the best interest of the company. See the cases of *Smith v Permanent Trustee Australia Ltd* (1992) 10 ACLC 906; *Queensland Press Ltd v Academy Investments No 3 Pty Ltd* (1987) 11 ACLR 419; and *Windsor v National Mutual Life Association of Australasia Ltd* (1992) 7 ACSR 210. C D

[57] The law provides in s 313(1) under 'Power of members to convene meeting of members at company's expense' a self-help mechanism for the aggrieved shareholders as follows: E

(1) If the directors —

(a) are required under section 311 to call a meeting of members; and

(b) do not do so in accordance with section 312, the members who requisitioned the meeting, or any of the members representing more than one half of the total voting rights of all of the members who requisitioned the meeting, may call for a meeting of members.' F

[58] There is thus no merit to say that the plaintiff and Radzee had acted in bad faith in not calling for the requisitioned EGM to be convened as the shareholders may proceed to convene the EGM under s 313 above. G

[59] As and when the EGM is convened under s 313 of the Companies Act 2016, the procedure for convening and conducting a members' meeting must be complied with and it is no answer to say that just because the directors of the Company did not act on the requisitioned EGM, they have no right to complain if the meeting so convened by the requisitioning shareholders does not comply with article 49 or s 329 of the Companies Act 2016. Two wrongs do not make a right even assuming that the plaintiff had been wrong in not calling for the requisitioned EGM. H I

[60] As the procedure had not been followed in a case where the rights of the director and chairman to be removed are affected, the result is that the

members' meeting is invalid and thus the resolution passed is invalid, null and void and so we had not hesitation in setting it aside.

Whether the violation of the articles of association and statutory requirement is curable

[61] It was argued before us that the violation or non-compliance is technical in nature and that no substantial injustice had been caused as the result would have been the same had the members' meeting been regularly held.

[62] We cannot second-guess what the result could have been for the plaintiff had the right to speak and defend his position as a director and chairman of the company before a vote is taken. Shareholders are free to align and realign themselves after hearing one another out. The right to be heard cannot be taken away from the shareholder who is also a director as well as chairman of the company and more so when he is sought to be removed.

[63] Assuming that the defendants' side would not be persuaded or dissuaded as the case may be, even if the plaintiff were to argue against the resolution so eloquently as to move a pigeon to come down from a tree, the result cannot be said to be a foregone conclusion where the voting on the resolution is concerned.

[64] As D2 could only exercise his voting right with respect to 50,000 shares out of his 100,000 shares in the company, both D1's shares of 175,000 combined with 50,000 of D2's shares through his proxy would give 225,000 shares between the defendants.

[65] The shareholding of the plaintiff with his 175,000 shares and that of Radzee 50,000 shares would have a combined total of 225,000 shares. There would be a tie and in such a case the chairman's voting becomes the determining and defining vote. Under article 53 of the articles of association of the company it is provided as follows:

> In the case of equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

[66] The plaintiff also alluded to the following:

(a) there were no allegations of wrongdoing against the plaintiff throughout his tenure as the chairman and/or director of the company and the requisition notice issued by D1 also does not mention any allegations of wrongdoings; and

(b) the plaintiff could not possibly respond to any allegations of wrongdoing at that particular point of time except if the same is raised during the said EGM where he was prematurely shut out from attending with the resolution being rushed through and the meeting concluded at 10.41am when D1 could only validly commence the EGM at 10.45am.

[67] The director to be removed, in this case, the plaintiff who is also a shareholder of the company, had every right to be heard as part of the rules of natural justice, before a vote is taken. This was alluded to and affirmed in by the Court of Appeal in *Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd* [2008] 3 MLJ 653 at p 669 as follows:

> ... The notice requirement in s 128 sufficiently meets the element of fairness as it makes the director concerned aware of the fact that there is a proposal to remove him or her. It is then up to the director concerned to prepare representations setting out the reasons why he or she should not be removed, eg, because he or she has always acted in the best interests of the company. He or she may then attend the general meeting and make an oral address answering his or her critics, if any. This, then, is the content of the rules of natural justice in the context and circumstances encapsulated in s 128 of the Act. The setting out of the grounds for proposing the removal is not a requirement of s 128 ...

[68] Though it was stated in the context of a public company, the position is no different for a private limited company where the constitution provides for such rights to be accorded to its directors as s 208 of the Companies Act 2016 reads as follows:

> (1) On receipt of special notice for a resolution to remove a director under subsection 206(3), the company shall forthwith send to the director a copy of the special notice.
>
> (2) The director shall be given the right to make oral representation or written representation not exceeding a reasonable length on the resolution to remove him.
>
> (3) Where the director makes written representation and requests the written representation be notified to the members, the company shall, unless the representation is received too late for the company to do so —
>
> (a) state the fact of the representation having been made in the notice of the resolution given to members of the company; and
>
> (b) send a copy of the representation to every member of the company to whom the notice of the meeting is sent.
>
> (4) If a copy of the representations is not sent as required under subsection (3) due to the representations received too late by the company or due to the default of the company, the director may, *without prejudice to his right to be heard orally*, require that the representations shall be read out at the meeting.

A (5) Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused.

B (6) The Court may order the company's costs on an application under subsection (5) to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

(7) *The constitution of a private company may provide the rights accorded under this section to its directors*. (Emphasis added.)

C

[69] Article 69 of the articles of association of the company expressly states as follow:

Subject to section 128, the company may be ordinary resolution remains any director before the expiration of his period of office, ...

D

[70] Section 128(2) of the Companies Act 1965 under which the company was incorporated provides as follows:

(2) Notwithstanding anything to the contrary in the memorandum or articles of the company, special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and t*he director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting*. (Emphasis added.)

E

F

[71] Learned counsel for the plaintiff argued that D1 and D2's conduct (through his proxy) was a further manipulation of the situation to continue with their acts of oppression against the plaintiff.

G

[72] The curative provision in s 582 of the Companies Act 2016 should only be harnessed to help cure an irregularity if the court is satisfied that no substantial injustice has been or may be caused which cannot be remedied by any order of the court. It reads as follows:

H 582 Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time *unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court.*

I (2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or any other provision of this Act, where any omission, defect, error or irregularity, including the absence of a quorum at any meeting of the company or of the directors has occurred in the management or administration of a company whereby —

(a) any breach of this Act has occurred;

(b) there has been default in the observance of the constitution of the company; or

(c) any proceedings at or in connection with any meeting of the company or of the directors or any assembly purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency under section 443, the Court —

(A) may, either of its own motion or on the application of any interested person, make such order as the Court thinks fit to-

(i) rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity; or

(ii) validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;

(B) shall, before making any such order, *satisfy itself that such an order would not do injustice to the company or to any member* or creditor;

(C) where any such order is made, may give such ancillary or consequential directions as the Court thinks fit; and

(D) may determine notice or summons to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how the notice or summons should be given or served and whether the notice or summons should be advertised in any newspaper.

(4) The Court, whether the company is in process of being wound up or not, may extend or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such extension may be ordered although the application for the same is not made until after the time originally allowed or limited. (Emphasis added.)

[73] The discretionary power under s 582 of the Companies Act 2016 (corresponding with the repealed s 355 of the Companies Act 1965) is not unfettered and must be exercised judiciously and the justice of the case should be considered seriously. See the decision of the Court of Appeal in *HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor and another appeal* [2005] 1 CLJ 23 at p 60.

[74] The Court of Appeal in *LGB Engineering Sdn Bhd & Ors v Rayston Resources Sdn Bhd* [2023] 1 MLJ 649 had occasion to cull from some decided cases from our own jurisdiction as well as those from Australia and Singapore some factors to bear in mind in the court exercising its exercise to use its curative power to validate a procedural irregularity as follows:

[184] Our Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 held that the

application of s 355 of the CA 1965 (the equivalent provision to s 582 of the CA 2016) is an exercise of discretion by the court, regard being had to:

> ... the justice of a particular case: it is not concerned with the question whether prejudice would result in the making of a validation order (see *Re Australian Continential Resources Ltd* (1975) 1 ACLR 405).

[185] In interpreting the scope of this curative and validating provision, our Court of Appeal made reference to the case of *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405 where in explaining the application of s 366 of the Australian Companies Ordinance 1962, which is in pari materia with s 355 of the CA 1965 and substantially similar to s 582 of the CA 2016, Blackburn J held:

> Some argument occurred on the connotation of the word 'injustice' in A this paragraph. In my opinion it necessarily implies a consideration of the relative gains or losses of the parties involved. Counsel for the respondents sought to persuade me that in effect the word 'injustice' meant 'loss'. The word 'prejudice' was the one he actually used in argument, and I use it here in the sense of loss or 'harm'. The gist of his argument was that if the order proposed would cause prejudice to the company, member, or creditor in question, that in itself was enough to preclude the making of the order, without regard to the effect of the order upon the rights of any other party. *I think this construction is incorrect, and that it would make the section far less useful. In my opinion the task of the court, in complying with para (e), will not be complete merely upon its satisfying itself that the order proposed would not cause prejudice (in the sense indicated) to any person of the classes mentioned. Such an order may well do so. Prejudice is not the criterion; justice is; and justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.* (Emphasis added.)

[186] Powell J in the New South Wales Supreme Court in a 1986 decision in *Broadway Motors Holdings Pty Ltd (in liq), Re* [1986] 4 ACLC 598 observed as follows:

> it must be shown that there is a nexus between the procedural irregularity which has occurred, and the matters of prejudice relied upon as constituting an injustice.

[187] Subsequently in another decision of the New South Wales Supreme Court in 1999 in the case of *Sutherland (in his capacity asliquidator of Sydney Applicances Pty Ltd (in liq)) v Robert Bosch (Australia) Pty Ltd* (2000) 33 ACSR 680; [2000] NSWSC 32, Santow J held that:

> The courts on occasion have taken a narrow view of the meaning of 'substantial injustice' for the purpose of s 1322 ... it was the procedural irregularity itself and not the ultimate outcome of an irregularly convened meeting which must cause the alleged substantial injustice.

[188] Then there is the 2010 decision of the Singaporean Court of Appeal in the case of *Thio Keng Poon v Thio Syn Pyn & Ors* [2010] 3 SLR 143, the Chao Hick Tin JA clarified that:

> ... it is clear that where there is a 'procedural irregularity', in the proceedings of

> a company, the proceeding in question will not be invalidated unless substantial injustice (that cannot be remedied by any order of the court) has been caused.
>
> ...
>
> All he has to show is that there may or could have been a different result. This possibility, however, should not be a theoretical or fanciful one. One must bear in mind the importance of operating in the realm of reality.

[75] The court in exercising its discretion is duty-bound to consider the seriousness and repercussions of the resolution sought in the light of the factual matrix and context of the shareholders' disputes. Here it was for the removal of a director who is a substantial shareholder of the company as well as the chairman of the board in the aftermath of a High Court finding of oppression by the majority represented by the defendants.

[76] The requisition is by D1 to remove the plaintiff as a director and chairman of the board which would ostensibly have the effect of nullifying the oppression decision of a previous High Court. On top of that is a pending dispute over the sale and ownership of the 50,000 shares registered in D2's name for which D2 had initially given a proxy to D1 for D1 to vote on his behalf at the requisitioned EGM only to then later realise that this might be in breach of D1's agreement with the plaintiff that the PA over the shares shall not be exercised until the dispute on the ownership of the 50,000 shares by D2 to the plaintiff had been decided by the sessions court.

[77] All that would heighten this court's scrutiny of the actions of the defendants in requisitioning for an EGM to remove the plaintiff as a director and chairman of the company and to put the defendants to strict compliance to the procedural requirements in article 49 and the statutory requirements of s 329 and the rights of the chairman to exercise his casting vote under article 53 of the company in what could well be a tie in the votes.

[78] The Court of Appeal in *HLB Nominee*'s case at p 56 highlighted the purport of the proposed resolution to remove directors and to elect those of the defendants' choice in a shareholders' dispute where the then current directors had been validly elected at the company's AGM and the need for strict compliance with the procedure in the articles and the then Companies Act 1965 as follows:

> In the present appeal, the purpose of the meeting to be held is to remove some of the existing directors including the second plaintiff and in their place to elect the directors of the defendant's choice. To do that, a proper and valid notice of such a meeting should be issued because that meeting would affect the right of those directors to be removed who had been duly elected at a proper and valid AGM of the company. For that, the process and procedure for calling such a meeting should be

adhered to strictly as stated in *Mansfield v NSW Leagues' Club Bowling Club Ltd*, the Australian case cited in the above judgment, where it was held that a general meeting to elect the board of directors was held to be invalid for want of proper notice. In my view, any defect in the process or procedure in calling the meeting and at the meeting is not curable under s 355 of the Act. In the present appeal, not only the notice was defective due to the fact that the meeting to be held exceeded the permissible three-month period but also that notice had been declared null and void. There is nothing to prevent the defendant from making another requisition for another EGM, whereby if the plaintiffs failed to convene the EGM requested, the defendant is at liberty to issue a proper and valid notice to hold the EGM.

[79] We hasten to add that in a case like this where the irregularity can be rectified by issuing a fresh notice and by exercising patience, which after all is a virtue, in waiting for the 15 minutes to pass before convening the requisitioned EGM with all gusto, then the party so minded should proceed accordingly. It is not the business of the court to second-guess the outcome of the EGM but to hold the parties to the bargain that they had struck in the Articles as well as the need to comply with the statutory requirement under s 329 of the Companies Act 2016.

[80] To exercise our discretion under s 582 of the Companies Act 2016 would be to pay lip-service to the right to be heard which right the plaintiff was deprived of in a resolution passed that affected grievously his position as a director and chairman of the company.

DECISION

[81] The appeal was allowed and the order of the High Court was set aside. We made an order in terms of the originating summons in prayers 2 and 4 as follows: a declaration that the resolution passed at the EGM on 9 March 2020 in removing the plaintiff as a director of the company is invalid and null and void and that plaintiff is still a director of the company D3. We also ordered costs of RM15,000 here and below to be paid to the plaintiff/appellant by the defendants D1 and D2 as R1 and R2 here, subject to allocator.

Appeal allowed; High Court's decision set aside; resolution passed at the EGM declared null and void; and the appellant was still a director of the company

Reported by Ashok Kumar